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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 130 of 1986

For Approval and Signature:

Hon'ble MR.JUSTICE A.R.DAVE
and
Hon'ble MR.JUSTICE D.A.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

RAMBHAI L PATEL

Versus

COMMISSIONER OF INCOME-TAX

Appearance:

1. INCOME TAX REFERENCE No. 130 of 1986
MR JP SHAH for Petitioner No. 1
MR MANISH R BHATT for Respondent No. 1

CORAM : MR.JUSTICE A.R.DAVE
and
MR.JUSTICE D.A.MEHTA

Date of decision: 09/08/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE D.A.MEHTA)

1. The following question of law has been referred to us under Section 256 (2) of the Income Tax Act, 1961 (hereinafter referred to as "the Act") by the Income Tax Appellate Tribunal, Ahmedabad Bench `C', Ahmedabad, for the opinion of this Court.

"Whether on the facts and in the circumstances of the case, the interest earned by the assessee was exempt u/s. 10(4A)?"

2. The applicant-assessee is a Hindu Undivided Family and the status under the Act is "Resident, but not ordinarily Resident". The assessment years involved in this reference are 1977-78 and 1978-79 and the relevant accounting periods are financial years ended on 31.3.1977 and 31.3.1978 respectively.

3. The applicant-assessee opened an account with Central Bank of India which was a Fixed Deposit Account and the same was treated as "Non Resident (External) account" as per the provisions of Foreign Exchange Regulation Act, 1947. The status of the assessee under the Act was "Non Resident" when the aforesaid account was opened. For the two years under consideration the assessee earned interest of Rs.22,710/- and Rs.52,629/- respectively and the said interest was claimed to be exempt under the provisions of Section 10 (4A) of the Act.

4. For the assessment year 1977-78, the claim was accepted by the Income Tax officer while for the assessment year 1978-79 the claim was rejected. For the first year, i.e. assessment year 1977-78 the Commissioner of Income Tax, under Section 263 of the Act, directed Income Tax Officer to include the interest earned by the assessee in the taxable income on the ground that the exemption provided by Section 10 (4A) of the Act was not available to an assessee who was "Not ordinarily resident". The assessee preferred an appeal before the Tribunal against the aforesaid order under Section 263 of the Act. For the Second year the assessee's appeal before the Appellate Assistant Commissioner failed and the assessee preferred the second appeal before the Tribunal. The Tribunal heard both the appeals together and held that the assessee was not entitled to the exemption granted under Section 10(4A) of the Act, as exemption was available only in case of assessee who is "Non Resident", while the assessee was "Not ordinarily resident" as defined under the Act.

5. Mr.J.P. Shah learned counsel for the assessee made the following points :-

(1) that the assessee was "Non resident" when the account was opened and therefore the benefit should be available;

(2) that it was a question of credibility of Government of India and not the Income Tax Department, because the circular issued by the Reserve Bank of India under the provisions of Foreign Exchange Regulation Act, and Rules thereunder should also have the same binding force as they were from another Government Department falling under the same Ministry;

(3) that the provisions of Section 10 (4A) of the Act must be interpreted keeping the object of the provisions in mind, namely to bring Foreign Currencies in the country;

(4) literal interpretation of the provisions should be avoided if it defeated object of the provisions;

(5) that the amendment made in 1982 specifically highlighted the fact that anomaly existed and hence the amendment should be held to be declaratory and should thus be made applicable for the earlier assessment years also;

(6) that while reading provisions of Section 10 (4A) of the Act a mechanical approach should be avoided and the department must act with fairness and justice.

6. It was further contended by Mr.Shah that when the Government of India, through Department of Banking, continued to use the funds deposited by the assessee it was necessary that the interest earned on those funds should continue to be exempt, especially in view of the fact that the assessee was admittedly "Non resident" when the moneys were deposited and the subsequent change in status should not be pleaded against the assessee for denying the exemption under Section 10 (4A) of the Act. It was further contended that though the term "Non

Resident" was defined under Section 2 (30) of the Act, the same should be interpreted as understood popularly or atleast, as understood and defined under the Foreign Exchange Regulation Act, because of the compelling circumstances surrounding the case of the assessee. For this proposition our attention was invited to the opening portion of Section 2 wherein phrase "unless the context otherwise requires" has been used.

7. Shri Akil Kureshi, learned standing counsel appearing on behalf of the respondent-department has referred to the definition of "non resident" within the meaning of Section 2 (30) of the Act and urged that the said definition has to be read in context of the meaning of "Resident" as defined in Section 6 and "Not ordinarily resident" as defined in Section 6 (6) of the Act. According to Mr.Kureshi, it was not possible to urge the meaning of "Non resident" as including "Not ordinarily resident" for the purposes of Section 10 (4A) of the Act; as where the legislature intended such inclusion it had specifically provided and for this purpose our attention was drawn to the mention of Sections 92, 93 and 168 of the Act in the definition Clause 2 (30) of the Act defining term "Non resident". Mr.Kureshi further submitted that there was nothing in the context of Section 10 (4A) of the Act which would permit reading of the term "Not ordinarily resident" so as to mean "Non resident"; that Section 10 (4A) specifies two conditions and only on fulfillment of the said conditions, did an assessee qualify for the exemption granted by the said provision. That mearly because an assessee was entitled to be treated as person not resident in India under the Foreign Exchange Regulation Act it did not permit him to automatically qualify for exemption under Section 10 (4A) of the Act. It was further submitted that the provisions of Section 10(4A) of the Act are clear, unequivocal and the bare reading of the same clearly show that no other interpretation was possible and it was only in this context that the legislature amended the provisions in 1982. It was further urged that the amendment of 1982 being clarificatory in nature cannot be applied retrospectively, and to the contrary, by virtue of the said amendment it was abundantly clear that the provisions as they stood before the amendment were not applicable in cases of persons who did not fulfill the criteria of being "Non resident" within the meaning of the Income Tax Act. Referring to the circulars issued by the Reserve Bank of India, it was submitted that the same were issued under Section 73 of the Foreign Exchange Regulation Act, and the Reserve Bank of India had no powers to grant exemption under the provisions of I.T.

Act and even if it was so mentioned in the circular, it was misreading of powers by the said authorities and the said circular cannot have the force of the statutory provision.

8. Mr.Kureshi, pointedly drew our attention to the decision of the Supreme Court in case of Smt.Tarulata Shyam and others v. Commissioner of Income Tax, 108 I.T.R. 345 and submitted that as stated thereunder when the wordings of provision are clear and unambiguous, when they plainly manifest what is stated therein, there is no scope for importing or substituting words in the provision, and the provision of Section 10 (4A) of the Act are such where it is not possible to ascribe any other meaning to the word "Not resident".

9. When the Finance Act, 1968 amended and altered the exemption originally granted by Section 10 (4A) of the Act with effect from 1.4.1969, the Central Board of Direct Taxes issued circular No.6-P (LXXVI-66) of 1968 dated 6th July, 1968. The relevant portion from the said circular reads as under :-

Interest Income of non-residents from non-resident accounts in a bank in India.

"115. Under the provisions in Section 10 (4A) of the Income Tax Act prior to its amendment by the Finance Act, 1968, a non-resident was exempt from tax on his income by way of interest on moneys standing to his credit in a non-resident account in any bank in India in accordance with the Foreign Exchange Regulation Act, 1947, and any rules made thereunder. The intention underlying this provision has been to provide the exemption in respect of interest only on funds which are repatriable outside India. In order to bring out this intention, Section 10 (4A) of the Income Tax Act has been amended by the Finance Act, 1968. Under the amended provisions, the exemption will be available only in respect of interest on moneys standing to the credit of a non-resident in a "Non-resident (External) Account in any bank in India in accordance with the Foreign Exchange Regulation Act, 1947, and any rules made thereunder. The Rules in this behalf will be made and notified by the Reserve Bank of India. This provision takes effect, prospectively, from the assessment year 1969-70 " [Circular No.6-P (LXXVI-66) of 1968 dated 6th July, 1968].

10. Thus legislative intent underlying the provisions is to provide exemption in respect of interest earned only on funds which are repatriable outside India. It is further clear that the exemption will be available in respect of interest on moneys credited in "Non resident (External) account" in case of "Non resident"; that such account has to be maintained in accordance with the Foreign Exchange Regulation Act and Rules made thereunder, and such Rules are to be made and notified by the Reserve Bank of India. Therefore, the Rules and the scheme framed by the Reserve Bank of India for the purpose of opening and operating a "Non resident (External) account" will have to be taken into consideration for the purpose of ascertaining the eligibility of assessee to claim exemption under Section 10 (4A) of the Act.

11. The scheme for opening and maintenance of "Non resident account in designated in Foreign currencies with authorised dealers in Foreign Exchange as framed by the Reserve Bank of India is available at page 41 of the paper-book and the eligibility of opening an account is in the following terms :-

Eligibility for opening accounts :

"The benefit of the scheme will be available to all individuals, being Indians and persons of Indian origin who are not resident in India. For the purpose of this scheme, non residents will be persons resident outside India as defined in Section 2 (q) of the Foreign Exchange Regulation Act, 1973. Companies, Firms, bodies, corporate and other associations of persons, by whatever name called, will not be eligible to open foreign currency (non-resident) accounts under the scheme".

12. Thus a person who is an individual, will be permitted to open non resident account and will be treated as "Non resident" for the purposes of operating "Non resident (External) account", if he is an Indian or a person of Indian origin who is not resident in India. It is further clarified that a person shall be held to be "Not resident in India" as defined in Section 2 (q) of the Foreign Exchange Regulation Act, 1973. It is pertinent to note that the "Non resident (External) account", Rule 1970 were published by Government of India under the Notification No.GSR/265 dated 10th February, 1970.

13. Admittedly, in case of the assessee, he was permitted to open "Non resident (External) F.D. Account" when his status was "Non resident" within the meaning of the Act. Further there is no dispute that even for the years under consideration, the status of the assessee was "Not ordinarily resident" and he was a person who was not resident in India within the meaning of provisions of Section 2 (q) of the Foreign Exchange Regulation Act, 1973 and thus was eligible to open and operate "Non resident (External) account" as per the Rules and the scheme framed by the Reserve Bank of India. The effect of this situation is:by virtue of the aforesaid circular dated 6th July, 1968, that the assessee who fulfills the eligibility conditions under the scheme framed by the Reserve Bank of India was entitled to operate "Non resident (External) account" and in light of the same he would be entitled to the benefit of being treated as "Non resident" for the purposes of the Act as specified in the circular issued by Central Board of Direct Taxes.

14. The provision of Section 10 (4A) as was effective from 1.4.1969 upto 31.3.1982 reads as follows:-

"(4A) in the case of a non-resident, any income from interest on moneys standing to his credit in a Non-resident (External) Account in any bank in India in accordance with the Foreign Exchange Regulation Act, 1947 (7 of 1947), and any rules made thereunder;"

14.1 The amended provision as substituted with effect from 1.4.1982 by the Finance Act, 1982 reads as under :-

"(4A) in the case of a person resident outside India, any income from interest on moneys standing to his credit in a Non-resident (External) Account in any bank in India in accordance with the Foreign Exchange Regulation Act, 1973 (46 of 1973), and any rules made thereunder".

Explanation : In this clause "person resident outside India" shall have the meaning assigned to it in clause (q) of Section 2 of the Foreign Exchange Regulation Act, 1973 (46 of 1973).

15. Therefore, what was stated by way of circular being circular No.6-P (LXXVI-66) of 1968 dated 6th July, 1968 was incorporated as part of the provisions with effect from 1.4.1982. Therefore the position in relation to assessee who is otherwise eligible to open and operate

"Non resident (External) account" as per the guidelines issued by Reserve Bank of India is that such person is entitled to be treated as "Non resident" for the purpose of exemption under Section 10 (4A) of the Act by virtue of the circular dated 6th July, 1968 upto 31.3.1982 and by virtue of the provisions itself with effect from 1.4.82. The amendment is thus declaratory of the legislative intent as can be gauged from the circular and even on that count assessee would be entitled to the relief claimed.

16. Even otherwise the term "Non resident" as defined in Section 2(30) of the Act has to be read in the contextual setting of Section 10 (4A) of the Act and if read in that manner the term "Non resident" will have to include within its fold the meaning as prescribed under the provisions of Foreign Exchange Regulation Act and Rules thereunder. Thus Section 10 (4A) of the Act will apply to a person who is not resident in India, that is to say, "Non resident" will be a person residing outside India. We may usefully reproduce from the decision of the Supreme Court in the case of K.V.Muthu v. Angamuthu Ammal, A.I.R. 1997 (S.C.) 628, where it is stated ;

> "While interpreting a definition, it has to be borne in mind that the interpretation placed on it should not only be not repugnant to the context, it should also be such as would aid the achievement of the purpose which is sought to be served by the Act. A construction which would defeat or was likely to defeat the purpose of the Act has to be ignored and not accepted".

17. As already seen, circular of 6th July, 1968 specifically declares object of the provisions and incorporates the provisions of the Foreign Exchange Regulation Act and Rules framed thereunder by the Reserve Bank of India in Section 10 (4A) of the Act. Thus those provisions should be applicable to a person claiming exemption under Section 10 (4A) of the Act and in this situation also the context requires that the term "Non resident" should be read so as to include the definition of the Non resident as understood under the provisions of Foreign Exchange Regulation Act and the Rules thereunder.

18. During the course of hearing we were addressed at great length by both the sides on the applicability or otherwise of doctrine of promissory estoppel. However, without going into that aspect of the matter we feel that the matter should be approached from another angle as stated by this Court in case of Taiyabji Lukmanji v.

Commissioner of Income Tax, 131 I.T.R. 643 wherein it was observed that ;

"In our opinion, the Tribunal ought to have considered the question as regards the legality and propriety of levying penalty under Section 271 (1) (c) of the Act in the light of the instructions given by the Board in the advertisement referred to above. Whether or not it amounted to promissory estoppel and created a legal right apart, the question was required to be examined from the standpoint of the credibility of the department. Would it not cause greater harm to the department itself if assessees who respond to its appeals and desire to cleanse themselves of the past sins are deterred from doing so? In a way, in the long run, it might be counter productive to do so. All these questions cannot be elbowed aside. They have to be met squarely in the face by the revenue authorities and the Tribunal by addressing themselves to it and answering the same in the manner considered right by them on policy and principle".

19. Therefore, even from the standpoint of the credibility of the department and in light of the aforesaid circular it is necessary that the assessee should be granted benefit of the exemption under Section 10 (4A) of the Act.

20. In light of what is stated hereinbefore we hold that the Tribunal was not justified in denying the claim of assessee that the interest earned by the assessee was exempt under Section 10 (4A) of the Act. The question referred to us is therefore answered in the affirmative i.e. in favour of the assessee and against the revenue.

The reference stands disposed of accordingly with no order as to costs.

9.8.2001. (A.R. Dave, J.)

(D.A. Mehta, J.)

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